through the "halfway stage" or to pay much attention to the theoretical justification of this American rule.[23] Of the American states, Virginia alone follows the English rule,[24] and Michigan and Indiana are the only states which have not progressed beyond the "halfway stage," though in the others there are minor variations which it would be out of place to note here.[25] It should be noted that the California court has progressed very far from the English view, in one case holding that even a satisfied judgment against one is no bar to a judgment against a second joint tortfeasor where to allow the bar would be to aid the defendant to take advantage of his own wrong.[26]

R. M. L.

WORKMEN'S COMPENSATION: "ARISING OUT OF EMPLOYMENT": "PROXIMATE CAUSE."—The Workmen's Compensation Act[1] is only applicable to injuries properly attributable to employment,[2]—hence the limitation of recovery to injuries, "arising out of and in the course of employment."[3] The absence of final judicial interpretation of this clause, and the lack of a decisive test in its application to a particular instance is shown by two recent cases.[4] In *Balboa Amusement Company v. Industrial Commission*[5] the injured employee was required to remain on the plant of the company when not actually engaged in acting. While crossing the street from one part of the plant to another, as the employees commonly did, he paused in the street to converse, and was run down by the automobile of one of the directors. Compensation was denied on the ground that when he paused in the street he assumed a risk common to all mankind and so the injury did not "arise out of the employment." But on the same day the same

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(1896), 146 Ind. 169, 45 N. E. 69; Matthews v. Menedger (1840), 2 McLean 145.

[23] Parmenter v. Barstow (1899), 21 R. I. 410, 43 Atl. 1035; Lovejoy v. Murray (1865), supra n. 20; Elliot v. Hayden (1870), 104 Mass. 180; Russell v. McCall (1894), 141 N. Y. 437, 36 N. E. 498; Sharp v. Gray (1844), 5 B. Mon. 4; Cleveland v. Bangor (1895), 87 Me. 259, 32 Atl. 892; Fox v. Northern Liberties (1841), 3 W. & S. 103; Compare the following California cases: Williams v. Sutton (1872), 43 Cal. 65; Dawson v. Schloss (1892), 93 Cal. 194, 29 Pac. 31; Butler v. Ashworth (1896), 110 Cal. 614, 43 Pac. 386; Chetwood v. California Bank (1896), 113 Cal. 414, 45 Pac. 704; San Pedro Co. v. Reynolds (1898), 121 Cal. 74, 53 Pac. 410.

[24] Petticolas v. Richmond, supra, n. 3.

[25] See Notes in 58 L. R. A. 410.

[26] San Pedro Co. v. Reynolds, supra, n. 23.

[1] Cal. Stats. 1913, Ch. 176. Amended Cal. Stats. 1913, chapters 541, 607, 662. Amended Cal. Stats. 1917, Ch. 585, p. 831.

[2] Brinton, Ltd. v. Turvey (1905) App. Cas. 230; Cooper v. Wright (1902) App. Cas. 302.

[3] Cal. Stats. 1917, Ch. 585, § 6(a), p. 831.

[4] Kitchenham v. Steamship Johannesburg (1911) App. Cas. 417.

[5] (Jan. 9, 1918), 26 Cal. App. Dec. 114.

court in *Whiting-Mead Company v. Industrial Commission*[6] allowed compensation for a burn caused by the injured man setting fire by his own cigarette to a bandage saturated with turpentine and applied to his hand over a cut received earlier in the day. The case is saved by the fact that the employment was responsible for the presence of the turpentine and so exposed the injured to a risk to which all smokers are not subjected. But the risk from smoking is as common to all mankind as risk from pausing to converse in the street. So the court shifts its ground from the test in the first case of whether the risk was one to which the injured was subjected by his employment or one shared by all mankind, and, using instead the test of whether the act is so commonly done and necessary as to be incidental to employment, holds that smoking is as necessary to life as is food[7] or water,[8] and that injury therefrom "arises out of employment."

The value of these cases lies in illustrating that no decisive interpretation of "arising out of and in the course of the employment" has yet been declared: that the tests used are not conclusive:[9] that analogies and comparisons of cases have not much value, but that each case must stand on its own facts:[10] and that Workmen's Compensation is still in the formulative stage and the rules by which the purpose of the act is to be effected are now in the making.

But the California Statute contains the further peculiar limitation, "where the injury is proximately caused by the employment."[11] In construing the act our courts have paid no attention to this clause. The Wisconsin court, however, has held[12] that the phrase "proximate cause" occurring in the statute of that state[13] is not to be given the special meaning it has in the law of negligence, but, as in common parlance, refers merely to a close causal relationship. This would seem to be the correct view.[14] Some, however, would urge that in using this plain and well defined legal term the legislature should be intended to mean what they have plainly expressed[15] and the phrase should be given its legal meaning. But in view of the fundamental principle

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[6] (Jan. 9, 1918), 26 Cal. App. Dec. 112.

[7] Clem v. Chalmers Motor Co. (1914), 178 Mich. 340, 144 N. W. 848; Carinduff v. Gilmore (1914), 7 B. W. C. C. 981.

[8] Archibold v. Ott. (W. Va., 1916), 87 S. E. 791.

[9] Supra, n. 3.

[10] Kitchenham v. Steamship Johannesburg, supra, n. 4.

[11] Cal. Stats. 1917, Ch. 585, § 6 (a), (3), p. 831.

[12] Milwaukee v. Industrial Comm .(1915), 160 Wis. 238, 246, 151, N. W. 247.

[13] Wis. Stats. 1915, Ch. 241, § 2394-3(3).

[14] In re Sponatski (1915), 220 Mass. 526, 108 N. E. 466.

[15] For this rule see Lake County v. Rollins (1888), 130 U. S. 671, 32 L. Ed. 1063, 9 Sup. Ct. Rep. 651.

of statutory construction of giving effect to legislative intent and carrying out the purposes of the act,[16] our court seems correct in ignoring the clause as adding nothing, but only expressing in another way the limitation that the injury must "arise out of and in the course of employment." To seize upon "proximate cause" and torture out of it some rigid rule or test of the law of torts would be to lose sight of the legislative intent to insure the employee against injury from employment apart from any tort liability, and would only delay determining for what injuries compensation should be given.

A. W. B.

WORKMEN'S COMPENSATION: EMPLOYER AND EMPLOYEE: INDEPENDENT CONTRACTOR.—That liability under workmen's compensation acts in most states[1] extends against the employer only in favor of a workman, servant, or employee as distinguished from an independent contractor, is of course well settled.[2] California's new act, which went into effect January 1, 1918, specifically excludes independent contractors from its scope.[3] Under former acts the Supreme Court of California held that the Industrial Commission did not have jurisdiction to award compensation to independent contractors.[4] A defence frequently urged, as it was in the case of *Easton v. Industrial Accident Commission*,[5] against compensation is, therefore, that the injured party was an independent contractor.[6] The question presented in such cases is whether the party injured bore the legal relation of independent contractor toward another for whom he was performing work, or whether the legal relationship of employee and employer existed so as to

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[16] Burr v. Dana (1863), 22 Cal. 11, 20; Atkins v. Disintegrating Co. (1873), 18 Wall., 272, 310, 21 L. Ed. 844; U. S. v. Freeman (1845), 3 How. 563, 11 L. Ed. 727; Sutherland on Statutory Construction § 254.

[1] Vermont, Massachusetts and Illinois are among the few states having peculiar statutes in that the line of their application is drawn on some other distinctions than that of employee or servant as distinguished from an independent contractor. Packett v. Moretown Creamery Co. (Vt. 1917), 99 Atl. 638; White v. Geo. A. Fuller Co. (Mass. 1917), 114 N. E. 829; Parker-Washington Co. v. Ind. Board (1916), 274 Ill. 498, 113 N. E. 976.

[2] Carstens v. Pillsbury (1916), 172 Cal. 572, 158 Pac. 218; Western Indemnity Co. v. Pillsbury (1916), 172 Cal. 807, 159 Pac. 721; Columbia School Supply Co. v. Lewis (Ind. 1917), 115 N. E. 103.

[3] Cal. Stats. 1917, ch. 586, § 8 (b). Although excluding independent contractors from its provisions in a general way, this act in its operation will be broader than a workmen's compensation act, and will include some who are, on principle, independent contractors, for it excludes manual laborers from the class of independent contractors even when free from control.

[4] Western Indemnity Co. v. Pillsbury, n. 2, supra; Carstens v. Pillsbury, n. 2, supra.

[5] (July 14, 1917), 25 Cal. App. Dec. 145, 167 Pac. 288. Rehearing denied by the Supreme Court Sept. 11, 1917.

[6] This defence was urged in all cases cited in these notes.